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Judicial Review of Local Government Decisions: “Midnight in the Garden of Good and Evil”

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I. INTRODUCTION

The concept of property is fundamental to our society, probably to any workable society. Operationally, it is understood by every child above the age of three. Intellectually, it is understood by no one.

—D. Friedman, *The Machinery of Freedom*

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In the United States, the concept of property exists, not as an abstraction, but as the “yield” of a tension between the individual freedom to own and use property and the inherent power of the government to regulate for the public health, safety, and welfare. Unfortunately, the constitutional framework for the tension between public and private interests in the use of private property is anything but coherent (what then Justice Rehnquist once described as “judicial clangor”),¹ leaving most observers, including the courts, frustrated and confused as to what are property rights. This jurisprudential environment of uncertainty is debilitating for responsible public and private resource planning and management,² as well as for property owners and developers who are affected by such programs in many ways.

The environment of uncertainty breeds confusion, polarization, and conflict. During the last two decades, the “legal defensibility” of land use regulations has predominated the dialogue of public planning in America to the exclusion of what planning is most appropriate.³ The public, concerned about environmental degradation, sprawl, and congestion, has pressed to expand public control over the private use of property. Property owners, while accepting the need for public control, have complained of regulatory abuses and have pressed the courts to rein in government regulations which have gone too far. The tension found most of its voice in the so-called “taking issue” where property rights “hawks,” or “taking mavens,” argued for just compensation when regulations went “too far.” The underlying objective of the hawks was not, however, to obtain compensation, but rather

1. In his dissent in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, *cert. denied*, 453 U.S. 922 (1981), Justice Rehnquist wrote:

I agree substantially with the views expressed in the dissenting opinions of THE CHIEF JUSTICE and JUSTICE STEVENS and make only these two additional observations: (1) In a case where city planning commissions and zoning boards must regularly confront constitutional claims of this sort, it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn; and (2) I regret even more keenly my contribution to this judicial clangor

Id. at 569-70 (Rehnquist, J., dissenting).

2. The term “resource planning and management” is intended to refer to the full range of planning and management initiatives including land use, air, water, wildlife and other public efforts to plan for the future and to regulate to achieve that future. Some observers call this “change management.” The term resource planning and management is intended to avoid the pejorative anti-development implications of the phrase “growth management.”

3. The planning and legal literature is literally awash with commentary on the subject and virtually every planning seminar has at least one program which focuses on “how far can you go?”

to create a deterrent against regulatory excesses. If a local government faces the possibility of paying just compensation far exceeding its boundaries, the theory was, then the government will be more cautious and may not go as far as it might otherwise be inclined to go.⁴ Ultimately, the taking issue was resolved in favor of compensation. However, the Supreme Court's holdings in *First English Evangelical Church v. County of Los Angeles*,⁵ *Nollan v. California Coastal Commission*,⁶ *Lucas v. South Carolina Coastal Council*,⁷ and *Dolan v. City of Tigard*⁸ have ignored the real weakness in the system, the lack of effective and efficient judicial review. The possibility of having to pay compensation for property rights does not act as a deterrent in the absence of meaningful review of government actions. Simply put, contemporary planning jurisprudence makes the question of remedy all but moot.

It should be self-evident that the compact between the government and the governed, on which this nation is founded, depends on the effectiveness of constitutional adjudication. Rights do not exist in a vacuum and the history of civil rights in this nation shows beyond peradventure that rights which cannot be enforced in court are no rights at all. In the land use field, property rights have become practically non-existent to the extent that, as of May, 1995, fifteen state legislatures had given up on the courts as the guardians of property rights, and have enacted laws which address the issue of property rights by limiting the power of government.⁹ The culprits in this sad story are the so-called "ripeness doctrine,"¹⁰ whereby justice delayed is justice denied, and the practical effect of the "fairly debatable rule." Both of these judicial standards which are applied to local government property regulation have contributed to the lack of effective judicial

4. In his highly influential dissent in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), Justice Brennan observed: "After all, if a policeman must know the Constitution, then why not a planner? In any event, one may wonder as an empirical matter whether the threat of just compensation will greatly impede the efforts of planners."

Id. at 661 n.26 (Brennan, J., dissenting).

5. 482 U.S. 304 (1987), *cert. denied*, 493 U.S. 1056 (1990).

6. 483 U.S. 825 (1987).

7. 505 U.S. 1003 (1992).

8. 114 S. Ct. 2309 (1994).

9. Jane C. Hayman & Nancy Stuparich, *Private Property Rights: Regulating the Regulators*, 70 FLA. B.J. 55 (Jan. 1996).

10. The ripeness doctrine is derived from the decision of the Supreme Court of the United States in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986).

review of such regulation. In *Pennsylvania Coal Co. v. Mahon*,¹¹ Justice Holmes observed that there is a tension between public and private interests in private property and that there must be limits. Justice Holmes wrote, “[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone.”¹²

The trouble is, limits are meaningful only if they are easily enforceable in court, the missing ingredient in contemporary planning law. The legal fiction that local planning and zoning decisions involving individual parcels of land, in the context of a particular development proposal, are legislative acts entitled to a presumption of validity, has compounded the problems with the practical effect of the “fairly debatable rule.” Indeed, the “anything goes,”¹³ fairly debatable rule so badly imbalanced public and private interests in regard to the use of land that it is practically impossible to redress even outrageous abuses of the zoning power.¹⁴

Worse still, the lack of a judicial enforcement of constitutional rights ensures that there is no “incentive” for local governments to do a “good” job of planning and regulating because it does not matter. Doing a “good” job is simply not required to win in court; thus, legal defensibility is “all that matters.” The result is that public planning is under funded and does not

11. 260 U.S. 393 (1922).

12. *Id.* at 413.

13. The “anything goes” epithet was originally coined by Judge Goldberg of the Fifth Circuit Court of Appeals in response to a series of Equal Protection cases following the Supreme Court of the United States’ opinion in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), in which Judge Goldberg’s invalidation of the city of New Orleans’ hot dog vendor regulation was overturned. The *Dukes* case is a classic illustration of the limited scope of review available to ensure that local government does not abuse constitutionally protected rights. After the Supreme Court of the United States overturned Judge Goldberg’s decision for the circuit court, Judge Goldberg commented: “With its holding in *Dukes* the Supreme Court has made it clear that in a case such as this, we must apply the test of ‘minimum rationality’ and that this test means little more than ‘anything goes.’” *Arceneaux v. Treen*, 671 F.2d 128, 136 (5th Cir. 1982) (Goldberg, J., specially concurring) (citing *Dukes*, 427 U.S. at 305). Further, Judge Goldberg stated: “[t]he Supreme Court chose to uphold this officially sanctioned wiener cartel, opining that ‘[t]he city could reasonably decide’ that the exempted vendors ‘had themselves become part of the distinctive character and charm that distinguished the Vieux Carre.’” *Id.* at 136 n.2.

14. A town recently argued, with a straight face, that a police power regulation should be sustained if the town could establish a “hypothetical” justification for its actions because it did not matter whether the justification was real or not. See Trial Memorandum of the Town of Sunnyvale, *Mayhew v. Town of Sunnyvale*, No. 87-3704-K (Tex. 192d Dist. Ct., Nov. 12, 1991).

have the political support needed to ensure that the growth and development of our cities is balanced and beneficial. American planning has not lived up to its capability, not because planners were unable to anticipate the terrible social and economic cost of mindless sprawl, but because planning was made irrelevant in a society that takes its cues from its legal institutions. The courts said "anything goes"; and local governments, which were delegated the state's police power, took the courts at their word, ignored planning, and embraced "anything goes," literally and figuratively. Indeed, even though the zoning enabling acts of most states required that zoning be "in accordance with a comprehensive plan," few if any communities had adopted comprehensive plans by the 1970s.

There are, however, three lines of cases, two from the Supreme Court of Florida, and one from the Supreme Court of the United States which could, if rationally and coherently applied to the realities of contemporary resource planning and management, establish a more certain and predictable environment for planners and developers alike. The first line of cases arises out of the Supreme Court of Florida's decisions in *City of Miami Beach v. Lachman*¹⁵ and *Burritt v. Harris*.¹⁶ The second line of cases is derived from the same court's more recent landmark holding in *Board of County Commissioners v. Snyder*,¹⁷ where the court employed a functional analysis to hold that individual rezoning actions are not legislative acts. The third line of cases relates to the Supreme Court of the United States' recognition of a substantive limitation on the police power within the Just Compensation Clause of the *Constitution of the United States*, starting with *Agins v. City of Tiburon*.¹⁸ Together, these three lines of cases, if rationally and fairly implemented, offer an alternative solution to the property rights debate, which would preserve for local governments the power and authority to go as far as necessary to protect the public health, safety, and welfare, but no further. This article discusses the law of planning and zoning as it exists under the auspices of the "fairly debatable rule" and analyzes how the previously mentioned three lines of cases can be effectively implemented.

15. 71 So. 2d 148 (Fla. 1953), *appeal dismissed*, 348 U.S. 906 (1955).

16. 172 So. 2d 820 (Fla. 1965).

17. 627 So. 2d 469 (Fla. 1993).

18. 447 U.S. 255 (1980).

II. SUPREME COURT LINE OF CASES

A. *The Fairly Debatable Rule*

[D]eference does not mean abdication.

—Justice Thurgood Marshall¹⁹

In its landmark decision in *Village of Euclid v. Ambler Realty Co.*,²⁰ the Supreme Court of the United States validated the concept of zoning as a proper exercise of the state's police power and established the constitutional standard for the substantive validity of local government planning and zoning actions.²¹ The Court stated: "it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having *no substantial relation to the public health, safety, morals, or general welfare.*"²² Two years later, the Court reaffirmed that "a substantial relationship to the public health, safety, and welfare" was the substantive *raison d'être* of a valid zoning action:

The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, *such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.*²³

The application of this standard to particular zoning actions has, unfortunately, been complicated and obscured in part by two forces—the legal fiction that a rezoning is a legislative act, and the so-called "fairly debatable rule." In *Euclid*, the Court, after establishing the constitutional standard for determining the substantive validity of a zoning regulation, noted that: "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."²⁴ There are very few statements which have been so widely

19. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 14 (1974) (Marshall, J., dissenting).

20. 272 U.S. 365 (1926).

21. *Id.* at 395.

22. *Id.* (emphasis added).

23. *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928) (quoting *Village of Euclid v. Ambler Realty Corp.*, 272 U.S. 365, 395 (1926)) (emphasis added).

24. *Euclid*, 272 U.S. at 388.

misunderstood and misapplied.²⁵ Some have construed the fairly debatable standard to mean that all a local government need do is hold a hearing where there is a debate to sustain the substantive validity of an action.²⁶ Others claim that the fairly debatable rule is an irrebuttable presumption of validity, requiring that all a local government need do is mouth words of rationality to sustain even the most extreme regulatory actions.²⁷

In either case, judicial review under the so-called fairly debatable rule is neither "swift nor just" and too often is little more than a test of whether the local government staff is smart enough to invoke the correct mantra of rationality. The "anything goes" character of the fairly debatable rule has undermined the integrity of planning and zoning and has promoted increasing polarization and division between the public and private sectors, ultimately contributing to the erosion of planning and zoning powers in the guise of property rights legislation. Worse still, the "anything goes" mentality has created a lack of judicial "incentive" to do a "good" job of

25. As one commentator stated:

Just what does "*fairly debatable*" mean? As Justice Frederick Hall of New Jersey said in the *Vickers* dissent, it can mean whatever you want it to and really provides no guide whatever since virtually any action can be considered fairly debatable. Given typically wide and liberal interpretations of the law, it allows precious few limitations on the average municipality. If it was not debatable, it probably would not be in the courts in the first place; at least, certainly the city thinks it is debatable, at a minimum. Localities are likely too smart in this day and age to act clearly and openly arbitrarily and unreasonably.

DON ALLENSWORTH, *LAND PLANNING LAW* 47 (1981) (footnote omitted).

26. As one judge stated in his concurring opinion:

I am not prepared to say, then, that a denial of a zoning application, or similar governmental permission, can never rise to the level of a substantive-due-process claim. Such claims should, however, be limited to the truly irrational—for example, a zoning board's decision made by flipping a coin, certainly an efficient method of decision making, but one bearing no relationship whatever to the merits of the pending matter.

Lemke v. Cass County, 846 F.2d 469, 472 (8th Cir. 1987) (Arnold, J., concurring) (emphasis omitted).

27. This is the practical import of the court's embrace of the "debate" in *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 1400 (1994), stating the now dubious proposition that:

Where . . . citizens consistently come before their city council in public meetings on a number of occasions and present their individual, fact-based concerns that are rationally related to legitimate general welfare concerns, it is not arbitrary and capricious for a city council to decide without a more formal investigation that those concerns are valid and that the proposed development should not be permitted.

Id. at 1387.

planning and regulating, which has deprived public planning of the funding and political support needed to ensure that growth and development is well-planned.

The problematic character of the fairly debatable rule is particularly perplexing because the supreme courts of both the United States and Florida have made it clear that the courts have an obligation to ensure that private property rights are not destroyed by regulatory excesses. Indeed, the Supreme Court of the United States' decision in *Nectow v. City of Cambridge*,²⁸ decided just two years after *Euclid*, makes it clear that the Supreme Court did not intend the fairly debatable rule to mean "anything goes." In *Nectow*, a property owner challenged a municipal decision to draw a zoning district boundary along the edge of his property instead of along the road on which the property fronted. As a result, the property, located in one corner of an urban block, was zoned differently from the balance of the block. After a hearing on the merits in front of a master, the Supreme Judicial Court of Massachusetts held:

If there is to be zoning at all, the dividing line must be drawn somewhere. There cannot be a twilight zone. If residence districts are to exist, they must be bounded. In the nature of things, the location of the precise limits of the several districts demands the exercise of judgment and sagacity. There can be no standard susceptible of mathematical exactness in its application. Opinions of the wise and good may well differ as to the place to put the separation between different districts.

....

Courts cannot set aside the decision of public officers in such a matter unless compelled to the conclusion that it has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety, or the public welfare in its proper sense. These considerations cannot be weighed with exactness. That they demand the placing of the boundary of a zone one hundred feet one way or the other in land having similar material features would be hard to say as [a] matter of law.

....

The case at bar is close to the line. But we do not feel justified in holding that the zoning line established is whimsical, without foundation in reason. In our opinion it is not violative of the rights secured to the

28. 277 U.S. 183 (1928).

plaintiff by the Constitution, either of this commonwealth or by the Fourteenth Amendment to the Constitution of the United States.²⁹

The Supreme Court of the United States, the source of the "fairly debatable rule," reversed and invalidated the municipal zoning action making it clear that the Court did not intend an "anything goes" standard for judicial review of local zoning decisions.³⁰ First, the Court paid deference to the lower court's decision and affirmed the constitutional standard established in *Euclid*:

We quite agree with the opinion expressed below that a court should not set aside the determination of public officers in such a matter unless it is clear that their action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."³¹

Then the Court carefully, and in detail, reviewed what it saw as the controlling facts of the case:

An inspection of a plat of the city upon which the zoning districts are outlined, taken in connection with the master's findings, shows with reasonable certainty that the inclusion of the locus in question is not indispensable to the general plan. The boundary line of the residential district before reaching the locus runs for some distance along the streets, and to exclude the locus from the residential district requires only that such line shall be continued 100 feet further along Henry [S]treet and thence south along Brookline [S]treet. There does not appear to be any reason why this should not be done. Nevertheless, if that were all, we should not be warranted in substituting our judgment for that of the zoning authorities primarily charged with the duty and responsibility of determining the question.³²

29. *City of Cambridge v. Nectow*, 157 N.E. 618, 620 (Mass. 1927), *rev'd*, 277 U.S. 183 (1928).

30. *Nectow*, 277 U.S. at 189.

31. *Id.* at 187-88 (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. at 365, 395 (1926)).

32. *Id.* at 188 (quoting *Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1927)). The master's findings were:

that no practical use can be made of the land in question for residential purposes, because among other reasons herein related, there would not be adequate return on the amount of any investment for the development of the property I am satisfied that the districting of the plaintiff's land in a residence district would not

Finally, the Court applied the substantial relationship test and found the challenged actions wanting:

The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restrictions cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. Here, the express findings of the master, already quoted, confirmed by the court below, is that the health, safety, convenience and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question. This finding of the master, after a hearing and an inspection of the entire area affected, supported, as we think it is, by other findings of fact, is determinative of the case. That the invasion of the property of plaintiff in error was serious and highly injurious is clearly established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained.³³

In the context of the state court decision, it is plain that Justice Sutherland, the author of both the *Nectow* and *Euclid* decisions, did not intend the fairly debatable rule to mean “anything goes.”

B. The “Substantially Advances” Rule

History would be a wonderful thing—if it were only true.

—Leo Tolstoy

In *Agins v. City of Tiburon*³⁴ the Supreme Court of the United States observed that:

The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state

promote the health, safety, convenience and general welfare of the inhabitants of that part of the defendant City, taking into account the natural development thereof and the character of the district and the resulting benefit to accrue to the whole City and I so find.

Nectow, 277 U.S. at 187.

33. *Id.* at 188-89 (citations omitted).

34. 447 U.S. 255 (1980).

*interests . . . or denies an owner economically viable use of his land. . . . The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.*³⁵

On its face, the Court's statement suggested the existence of a substantive limitation on the police power. The suggestion was either ignored, dismissed as a misnomer reference to the due process requirement that a regulation bear some substantial relationship to the public health, safety, and welfare, or explained as a contemporary use of the word "taking" as a metaphor for invalidity.³⁶ *Nectow* was, after all, a substantive due process case, not a taking case.

In 1986, however, the Court restated in *Agins* the proposition first recognized in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,³⁷ and then in *Nollan v. California Coastal Commission*.³⁸ *Nollan* involved more than a recitation of established principle because it was clear that the Court was not referring to a due process requirement when it spoke of a "failure to substantially advance" a violation of the Fifth Amendment. Justice Scalia wrote:

Contrary to Justice BRENNAN's claim, our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State 'could rationally have decided' that the measure adopted might achieve the State's objective."³⁹

35. *Id.* at 260 (citations omitted).

36. See, e.g., Daniel R. Mandelker & Michael M. Berger, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, 42 LAND USE L. & ZONING DIG., Jan. 1990, at 3, 5 (lamenting the Supreme Court's ad hoc, fact-based taking decisions, and their ripeness doctrine, as preventing the development of a clear body of constitutional law for the states to follow).

37. 480 U.S. 470, 485 (1987). "We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.'" *Id.* (quoting *Agins*, 447 U.S. at 260).

38. 483 U.S. 825 (1987).

39. *Id.* at 834 n.3 (citations omitted).

Further, any doubt as to whether the Supreme Court reads the Just Compensation Clause to be a substantive limitation on exercises of the police power (that is, to be valid, a regulation must substantially advance a legitimate public purpose) was resolved in the Court's decision in *Lucas v. South Carolina Coastal Council*.⁴⁰ The Court stated: "*As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'*"⁴¹ Additional confirmation of the vitality of the substantially advances standard is found in *A.A. Profiles, Inc. v. City of Fort Lauderdale*,⁴² which held that an exercise of the police power was a taking in violation of the just compensation clause because it failed to "substantially advance a legitimate public purpose."⁴³ The court went on to state:

The Supreme Court has recognized that a taking may occur where a governmental entity exercises its power of eminent domain through formal condemnation proceedings, . . . or where a governmental entity exercises its police power through regulation which restricts the use of property. . . . *In the latter situation the government regulation must "substantially advance" a "legitimate state interest" or deprive an owner of an economically viable use of the land.*⁴⁴

The emergence of a Fifth Amendment substantive limitation on the police power may well be the most significant event in contemporary planning law. Indeed, a constitutional requirement that a regulatory action actually advance (substantially or otherwise) a legitimate public purpose implicates a scope of judicial review far more exacting than either the Florida "bounds of necessity" standard, or the rational justification standard discussed above, and could relegate substantive due process challenges to the annals of history.

Undoubtedly, local governments will take the position that the Supreme Court of the United States does not mean what it says and that a "substantially advances" standard would destroy growth management as we know it. If the "substantially advances" requirement, under the taking clause, becomes the nominal vehicle for challenges to local zoning decisions, growth management will change dramatically. But that does not mean that

40. 505 U.S. 1003 (1992).

41. *Id.* at 1016 (citing *Agins*, 447 U.S. at 260) (citations omitted) (first emphasis added).

42. 850 F.2d 1483 (11th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989).

43. *Id.* at 1486.

44. *Id.* (emphasis added) (citations omitted).

local governments will be helpless to ensure that growth and development "proceeds in an orderly manner."⁴⁵ To the contrary, a more exacting standard of review would motivate local governments to do a better job of planning, to go beyond the minimums that to a large extent have defined the quality and character of planning in Florida.

III. THE *MIAMI BEACH* AND *BURRITT* LINE OF CASES

That judicial deference does not mean abdication is also clear from the precedents of the Supreme Court of Florida. In one of its earliest zoning cases, the Supreme Court of Florida, in *City of Miami Beach v. Lachman*,⁴⁶ made it clear that judicial review was more than a *pro forma* exercise. The court held that:

While Village of Euclid, Ohio v. Ambler Realty Company approved the zoning and segregation of private property into residential, business, and industrial districts, it was as *equally emphatic that if such zoning did not have some substantial relation to the public health, safety, morals, and general welfare, it would be held to be arbitrary, unreasonable, and unconstitutional*. There is no warrant whatever in this, or any other, case to support the thesis that zoning boards are infallible and that any kind of zoning proposition [that] they promulgate will be upheld. In other words, zoning boards are in the same category as all other administrative boards. *Their ordinances and regulations will be given serious consideration and their judgments great weight, but where it is conclusively shown that they deprive one of his property without due process or otherwise infringe on State or Federal constitutional guarantees unreasonably, such ordinances and regulations cannot be said to be reasonably debatable and will be stricken down.*

We understand the doctrine of *Marbury v. Madison* to be applicable. "When it is clear that a statute transgresses the authority vested in the legislature by the constitution, it is the duty of the courts to declare the act unconstitutional because they cannot shrink from it without violating their oaths of office. *This duty of the courts to maintain the constitution as the fundamental law of the state is imperative and unceasing*" and applies as imperatively when properly

45. Board of County Comm'rs v. Snyder, 627 So. 2d 469 (Fla. 1993).

46. 71 So. 2d 148 (Fla. 1953), appeal dismissed, 348 U.S. 906 (1955).

*invoked against a zoning ordinance as it does against an act of the legislature.*⁴⁷

There is, in fact, a substantial body of law that suggests that the standard of review in Florida has been and is more exacting than the “anything goes” deferential, fairly debatable standard.⁴⁸ While the fairly debatable rule is frequently invoked by the Florida courts, sometimes in its “anything goes” garb, there is a clear line of cases which invokes a very different, more rigorous standard.

In *Burritt v. Harris*,⁴⁹ the Supreme Court of Florida expanded on *Lachman* and held that:

The constitutional right of the owner of property to make legitimate use of his lands may not be curtailed by unreasonable restrictions under the guise of police power. *The owner will not be required to sacrifice his rights absent a substantial need for restrictions in the interest of public health, morals, safety or welfare. If the zoning restriction exceeds the bounds of necessity . . . they must be stricken as an unconstitutional invasion of property rights.*⁵⁰

The difference between the standard enunciated in *Burritt* and the “anything goes” standard of the fairly debatable mantra is palpable. A plain reading of the court’s holding makes it clear that when property rights are affected, the standard of justifiable regulation is one of necessity, not choice, which is the sine qua non of the constitutional imperative for a substantial relationship to the public health, safety, and welfare. It would be difficult for the court to have been more explicit when it stated: “[i]f the zoning restriction exceeds the bounds of necessity . . . they must be stricken as an unconstitutional invasion of property rights.”⁵¹

On its face, *Burritt* stands for the proposition in Florida that the Supreme Court of the United States’ statement, “bears some substantial

47. *Id.* at 150 (emphasis added) (citations omitted). This case involved a suit by 10 property owners based on the refusal of the City of Miami Beach to rezone their ocean front property to allow multifamily homes. The court ultimately found the ordinance “fairly debatable” and ruled in favor of the City. *Id.* at 153.

48. See *Davis v. Sails*, 318 So. 2d 214 (Fla. 1st Dist. Ct. App. 1975).

49. 172 So. 2d 820 (Fla. 1965).

50. *Id.* at 823 (emphasis added) (footnotes omitted). *Burritt* involved a denial of a rezoning request by a property owner whose property was zoned residential, but due to its proximity to an airport, was incontrovertibly unsuitable for residential use. The court found that the county failed to show that its denial was fairly debatable. *Id.*

51. *Id.*

relationship to the public health, safety, and welfare," means that an "owner will not be required to sacrifice his rights absent a substantial need for restrictions in the interest of the public health, morals, safety or welfare."⁵² Some commentators have tried to avoid the holding of *Burritt v. Harris* by claiming that the holding was overruled in *City of St. Petersburg v. Aikin*.⁵³ However, it is clear that *Aikin* did not affect the substantive holding in *Burritt*.

The issue in *Aikin* was simply whether the burden was "upon the zoning authority to prove the reasonableness and necessity of a zoning classification" or "upon the petitioner [property owner] to show that the application for rezoning raised a matter which was not a fairly debatable issue before the legislative authority."⁵⁴ The court held:

We conclude that the opinion last above cited [that the burden is on the petitioner] correctly states the *procedural* point, and that the opinion of this Court in *Burritt v. Harris* has been erroneously construed as creating "an innovation in the zoning law of Florida." Other recent cases recognize no such departure, and continue to apply the well established body of law in this field.⁵⁵

Any doubt that the *Aikin* court was receding from its "necessity" holding in *Burritt* is disposed of by the court's citation of *Smith v. City of Miami Beach*.⁵⁶ There, the court, far from disavowing the *Burritt* court's necessity holding, noted:

It is fundamental that one may not be deprived of his property without due process of law, but is also well established that he may be restricted in the use of it when that is *necessary* to the common good. So in this case we must weigh against the public weal plaintiff's rights to enjoy unhampered property acquired since the enactment of the

52. *Id.* at 823 (citing *Tollius v. City of Miami*, 96 So. 2d 122, 125 (Fla. 1957)).

53. 217 So. 2d 315 (Fla. 1968).

54. *Id.* at 316 (footnotes omitted).

55. *Id.* (emphasis added) (footnotes omitted). By this holding, the Supreme Court has created an "innovation in the zoning law of Florida," *see id.*, by casting on the zoning authority the burden of establishing by a preponderance of evidence that the zoning restrictions under attack "bear[] substantially on the public health, morals, safety or welfare of the community," *Burritt v. Harris*, 172 So. 2d 820, 822 (Fla. 1965), if the ordinance is to be sustained. *See Lawley v. Town of Golfview*, 174 So. 2d 767, 770 (Fla. 2d Dist. Ct. App. 1965). *But see Aikin*, 217 So. 2d at 316 (disclaiming that the *Burritt* decision created an "innovation on the zoning law of Florida").

56. 213 So. 2d 281 (Fla. 3d Dist. Ct. App. 1968).

ordinance. Such restrictions must find their basis in the safety, health, morals or general welfare of the community.⁵⁷

Burritt is not alone. In fact, outside of the zoning area, there has never been any question in Florida that property rights are well-protected from overzealous regulation. For example, in *State v. Leone*,⁵⁸ decided just five years before *Burritt*, the Supreme Court of Florida held that: "While it is true that the constitutional guarantee of individual rights does not prevent the exercise of the police power so as to interfere with such rights, it does operate to limit the exercise of that power."⁵⁹ The court further stated that:

[T]he police power may be used only against those individual rights which are reasonably related to the accomplishment of the desired end which will serve the public interest. This means that the interference with or sacrifice of the private rights must be necessary, i.e. must be essential, to the reasonable accomplishment of the desired goal. Such interference or sacrifice of private rights can never be justified nor sanctioned merely to make it more convenient or easier for the State to achieve the desired end. This is so because one, if not the principal, reason for the existence of a democratic form of government is to guarantee to the individual freedom of action in those pursuits which do not harm his neighbors. *If there is a choice of ways in which government can reasonably attain a valid goal necessary to the public interest, it must elect that course which will infringe the least on the rights of the individual.*⁶⁰

Further, contrary to the fairly debatable mantra mavens, the court's narrow view of the balance between public and private rights is not "ancient" law, but rather, good law. As the Supreme Court of Florida stated in *In re Forfeiture of 1969 Piper Navajo*:⁶¹

In this case the method chosen by the legislature . . . is not sufficiently narrowly tailored to the objective . . . to survive constitutional scrutiny. This is particularly so because *property rights* are protected by a number of provisions in the Florida Constitution. Article I, section 2 provides that "[a]ll natural persons are equal before the law and have inalienable rights, among which are the right . . . to acquire,

57. *Id.* at 283-84 (emphasis added).

58. 118 So. 2d 781 (Fla. 1960).

59. *Id.* at 784 (emphasis added).

60. *Id.* at 784-85.

61. 592 So. 2d 233 (Fla. 1992).

possess and protect property" Article I, section 9 provides that "[n]o person shall be deprived of life, liberty or property without due process of law" Article I, section 23 provides that "[e]very natural person has the right to be let alone and free from governmental intrusion into his private life" As we have previously noted, "[t]hese property rights are woven into the fabric of Florida history." The main thrust of these protections is that, so long as the public welfare is protected, every person in Florida enjoys the right to possess property free from unreasonable government interference.⁶²

Nor can these clear precedents be dismissed by suggesting that the property rights principles in cases like *Leone* (regulation of drug stores) and *Piper Navajo* (forfeiture) have no application in the planning and zoning arena. Property is property. Nowhere in the federal or state constitutions is there a footnote that diminishes the fundamental character of real property or its use.

What this all means is that the fairly debatable rule is nothing more than a *jurisprudential rule of procedure* by which the courts judge the evidence in a substantive due process case to determine whether a challenged action bears some substantial relationship to the public health, safety, and welfare.⁶³ Under this regime, a plaintiff has an "extraordinary burden of proof,"⁶⁴ not because it is hard for a plaintiff to win, but because the burden is on the plaintiff to initially prove a negative; to succeed, the plaintiff must show that the regulation does not bear a substantial relationship to the public health, safety, and welfare. It is always difficult to prove a negative; in some cases, however, it is possible.⁶⁵ In the absence of a

62. *Id.* at 236 (quoting *Shriners Hosp. v. Zrillic*, 563 So. 2d 64, 67 (Fla. 1990)) (emphasis added).

63. It is important to keep in mind that *Euclid* was a facial challenge and that the Court's homily to legislative deference was made in that context. Given the Court's holding in *Nectow*, an "as applied" case just two years later, it is surely open to question as to whether the fairly debatable rule should have ever been employed in an "as applied" challenge regardless of the legal fiction that rezonings were legislative acts.

64. "One who assails zoning legislation has an extraordinary burden of proving that a municipal enactment is invalid." *S.A. Healy Co. v. Town of Highland Beach*, 355 So. 2d 813, 815 (Fla. 4th Dist. Ct. App. 1978); *see also* *City of Miami Beach v. Weisen*, 86 So. 2d 442 (Fla. 1956); *Dade County v. Beauchamp*, 348 So. 2d 53 (Fla. 3d Dist. Ct. App. 1977), *cert. denied*, 355 So. 2d 512 (Fla. 1978); *Neubauer v. Town of Surfside*, 181 So. 2d 707 (Fla. 3d Dist. Ct. App.), *cert. denied*, 192 So. 2d 488 (Fla. 1966).

65. For example, a local government's decision to designate a parcel of land as a rural services area on fiscal grounds could be shown to not bear the requisite relationship to the public health, safety, and welfare where a plaintiff demonstrates that all required urban

prima facie showing of invalidity, a court has an obligation to sustain the governmental action. However, once the plaintiff makes a prima facie showing, the burden should shift to the local government to demonstrate that the challenged actions do in fact bear a substantial relationship to the public health, safety, and welfare. If after hearing the local government's evidence, the court finds that the evidence is such that reasonable men could arrive at different conclusions, i.e., the record is not determinative and admits to more than one conclusion, then the fairly debatable rule dictates that the court should favor the local government.⁶⁶ On the other hand, if the manifest weight of the evidence favors the plaintiff or the defendant, then the fairly debatable rule has no application, and the court should rule according to its determination.

IV. BOARD OF COUNTY COMMISSIONERS V. SNYDER

A. Zoning as a Legislative Act

As indicated above, one of the more unfortunate elements in zoning law has been the legal fiction, apparently derived from *Euclid*, that zoning constitutes a legislative act and is therefore entitled to a presumption of validity. In truth, rezoning which involves an individual parcel of land and a particular plan of development is not an exercise of legislative power. Nevertheless, until 1972, courts throughout the United States treated individual rezonings as if they were an exercise of legislative power at the highest level, establishing public policies of general application entitled to abject judicial deference.

Prior to the Civil War, local land use controls were limited in nature and generally related to fire and building standards.⁶⁷ Late in the Nineteenth century, local government concern about the compatibility of land uses began to sharpen and expand.⁶⁸ By 1920, local governments were

services are already available to serve the property.

66. This aspect of the fairly debatable rule is not easy to understand. Traditionally, ambiguities of every kind between the government and the governed are resolved in favor of the governed in respect for the principle of reserved powers.

67. See *Dainese v. Cooke*, 91 U.S. 580 (1875); *City of Buffalo v. Chadeayne*, 7 N.Y.S. 501 (Sup. Ct. 1889), *aff'd*, 31 N.E. 443 (N.Y. 1892).

68. Most early regulations focused on excluding nuisances and particularly noxious uses from residential neighborhoods.

enacting zoning ordinances directed at excluding anything and everything likely to be an undesirable use.⁶⁹ As one commentator notes:

[U]rban America was in something of a crisis in the early 1920's. Like a patient who could endure his fever until he suddenly learned that there was now a new remedy for it and who was then impatient to be cured, urban America was now sure that it would perish if it did not have zoning Zoning was the heaven-sent nostrum for sick cities, the wonder drug of the planners, the balm sought by lending institutions and householders alike. City after city worked itself into a state of acute apprehension until it could adopt a zoning ordinance.⁷⁰

The validity of zoning, however, no matter how popular, was not immediately apparent to some courts. For example, the Supreme Court of Texas announced:

The ordinance is clearly not a regulation for the protection of the public health or the public safety. *It is idle to talk about the lawful business of an ordinary retail store threatening the public health or endangering the public safety.* It is equally idle in our opinion to speak of its impairing the public comfort or as being injurious to the public welfare of a community.⁷¹

69. See generally *Hadacheck v. Sebastian*, 239 U.S. 394, 413-14 (1915) (upholding a prohibition on manufacture of bricks in select districts in the city of Los Angeles in spite of fact that use began prior to time that property was annexed into city and prior to adoption of regulation, and despite fact that manufacture of bricks was physically connected to particular property due to presence of specific clay and that relocation of clay would make manufacture of bricks fiscally prohibitive); *Reinman v. Little Rock*, 237 U.S. 171, 176-77 (1915) (upholding prohibition of livery stables; and finding that although livery stables are not nuisances per se, in particular circumstances and particular localities they may be deemed nuisances in fact and in law, limited only by condition that such police power not be used arbitrarily or discriminatorily).

70. Charles L. Siemon, *The Paradox of "In Accordance With a Comprehensive Plan" and Post Hoc Rationalizations: The Need for Efficient and Effective Judicial Review of Land Use Regulations*, 16 STETSON L. REV. 607, 608 (1987) (citations omitted).

71. *Spann v. City of Dallas*, 235 S.W. 513, 516 (Tex. 1921) (emphasis added). The Supreme Court of Kansas similarly held:

Under the welfare provision of the statute, a city may exercise broad police power in protecting the public health, safety, and comfort, but to prohibit an owner of property from using it for ordinary business purposes, or for any use not in itself a nuisance, where there is no express legislative authority, is not within municipal power.

Julian v. Golden Rule Oil Co., 212 P. 884, 885 (Kan. 1923).

To other courts, such as the Supreme Court of Illinois, the logic of zoning was inescapable:

The state imposes restraints upon individual conduct. Likewise its interests justify restraints upon the uses to which private property may be devoted. By the protection of individual rights the state is not deprived of the power to protect itself or to promote the general welfare. Uses of private property detrimental to the community's welfare may be regulated or even prohibited. The harmless may sometimes be brought within the regulation or prohibition in order to abate or destroy the harmful. The segregation of industries, commercial pursuits, and dwellings to particular districts in a city, when exercised reasonably, may bear a rational relation to the health, morals, safety, and general welfare of the community. The establishment of such districts or zones may, among other things, prevent congestion of population, secure quiet residence districts, expedite local transportation, and facilitate the suppression of disorder, the extinguishment of fires, and the enforcement of traffic and sanitary regulations. The danger of fire and the risk of contagion are often lessened by the exclusion of stores and factories from areas devoted to residences, and, in consequence, the safety and health of the community may be promoted. These objects, among others, are attained by the exercise of the police power.⁷²

In 1926, the Supreme Court of the United States resolved the validity of zoning in favor of rezoning in *Village of Euclid v. Ambler Realty Co.*⁷³

72. *City of Aurora v. Burns*, 149 N.E. 784, 788 (Ill. 1925) (citation omitted). The court cited with favor a host of pro-zoning decisions from around the country. *Id.*; see *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Zahn v. Board of Public Works*, 234 P. 388 (Cal. 1925), *aff'd*, 274 U.S. 325 (1927); *Miller v. Board of Public Works*, 234 P. 381 (Cal. 1925); *Brown v. City of Los Angeles*, 192 P. 716 (Cal. 1920); *City of Des Moines v. Manhattan Oil Co.*, 184 N.W. 823 (Iowa 1921); *West v. City of Wichita*, 234 P. 978 (Kan. 1925); *Ware v. City of Wichita*, 214 P. 99 (Kan. 1923); *State ex rel. Civello v. City of New Orleans*, 97 So. 440 (La. 1923); *Bamel v. Building Comm'r*, 145 N.E. 272 (Mass. 1924); *Brett v. Building Comm'r*, 145 N.E. 269 (Mass. 1924); *Spector v. Building Inspector*, 145 N.E. 265 (Mass. 1924); *Building Inspector v. Stocklosa*, 145 N.E. 262 (Mass. 1924); *In re Opinion of the Justices*, 127 N.E. 525 (Mass. 1920); *State v. Houghton*, 204 N.W. 569 (Minn. 1925), *aff'd*, 273 U.S. 671 (1927); *In re Cherry*, 193 N.Y.S. 57 (App. Div.), *aff'd*, 138 N.E. 465 (N.Y. 1922); *Lincoln Trust Co. v. Williams Bldg. Corp.*, 128 N.E. 209 (N.Y. 1920); *Pritz v. Messer*, 149 N.E. 30 (Ohio 1925); *Salt Lake City v. Western Foundry & Store Repair Works*, 187 P. 829 (Utah 1920); *Holzbauer v. Ritter*, 198 N.W. 852 (Wis. 1924); *State ex rel. Carter*, 196 N.W. 451 (Wis. 1923).

73. 272 U.S. 365 (1926).

In *Euclid*, a property owner challenged a zoning ordinance, on its face, on the grounds that the ordinance violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the *Constitution of the United States* and similar provisions of the *Constitution of the State of Ohio*.⁷⁴ The issue, from the landowner's perspective, was not the authority of the Village to regulate the use of land,⁷⁵ but the inherent "arbitrariness" of the regulations at issue. The district court ruled in favor of the plaintiff, but the Supreme Court reversed.⁷⁶ The Court held:

We believe it, however, to be the law that these powers must be reasonably exercised, and that a municipality may not, under the guise of the police power, arbitrarily divert property from its appropriate and most economical uses, or diminish its value, by imposing restrictions which have no other basis than the momentary taste of public authorities. Nor can police regulations be used to effect the arbitrary desire to have a municipality resist the operation of economic laws and remain rural, exclusive and aesthetic, when its land is needed to be otherwise developed by that larger public good and public welfare, which takes into consideration the extent to which the prosperity of the country depends upon the economic development of its business and industrial enterprises.⁷⁷

On its face, the *Euclid* Court's holding—coming as it did in a facial challenge to zoning—was consistent with established balance of powers principles.⁷⁸ Unfortunately, two years later, the same court appeared to

74. *Id.* at 384. The plaintiff requested an injunction restraining the Village from enforcing the ordinance and from attempting to impose any of the ordinance restrictions on the subject property. *Id.*

75. Indeed, counsel for the landowner stated in his argument:

That municipalities have power to regulate the height of buildings, area of occupation . . . and density of use, in the interest of the public safety, health, morals, and welfare, are propositions long since established; that a rational use of this power may be made by dividing a municipality into districts or zones, and varying the requirements according to the characteristics of the districts, is, of course, equally well established.

Id. at 373.

76. *Id.* at 397.

77. *Euclid*, 272 U.S. at 373-74.

78. See, e.g., *City of Miami Beach v. Lachman*, 71 So. 2d 148, 150 (Fla. 1953), *appeal dismissed*, 348 U.S. 906 (1955) (citations omitted) (describing the doctrine of *Marbury v. Madison* as: "When it is clear that a statute transgresses the authority vested in the legislature by the constitution, it is the duty of the courts to declare the act unconstitutional because they cannot shrink from it without violating their oaths of office").

invoke the same standard of review in an “as applied” challenge.⁷⁹ In so doing, the *Euclid/Nectow* Court emasculated planning as a logical and rational predicate to land use regulation, and in the bargain exalted what noted zoning expert Richard F. Babcock would describe forty years later as “trial by neighborism.”⁸⁰ That was so because the legal fiction on which the *Euclid/Nectow* court relied—that zoning was a legislative act entitled to judicial deference—distanced zoning from rational thought (planning) and merit-based decision making.

It is not clear how the legal fiction that zoning was a legislative act came into being. However, there can be no doubt that the Supreme Court’s prescription for deference in the context of a facial challenge to a zoning ordinance, which was established in *Euclid*, was somehow transmogrified into the proposition that zoning is a legislative power and individual rezonings are legislative acts. This transmogrification is particularly mysterious because the Supreme Court itself, in *Nectow*, clearly went beyond abject deference when it invalidated zoning as applied to a particular parcel of land.⁸¹

Once recognized as a legislative act, zoning was freed from the due process strictures of fundamental fairness and was subject to great deference in the event that a property owner was so bold as to question a local government zoning decision. In the 1950s and 60s, many commentators pointed to the legislative act fiction as the key problem with zoning jurisprudence and argued that the fiction should be abandoned. One commentator noted:

The freedom from accountability of the municipal governing body may be tolerable in those cases where the legislature is engaged in legislating but it makes no sense where the legislature is dispensing or refusing to dispense special grants. When the local legislature acts to pass general laws applicable generally it is performing its traditional role and it is entitled to be free from those strictures we place upon an agency that is charged with granting or denying special privileges to particular persons. When the municipal legislature crosses over into the role of hearing and passing on individual petitions in adversary proceedings it should be required to meet the same procedural standards we expect from a traditional administrative agency.⁸²

79. See *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

80. See RICHARD F. BABCOCK, *THE ZONING GAME* 141 (1966).

81. *Nectow*, 277 U.S. at 188-89 (holding residential use classification invalid as applied to a portion of a large tract which was unsuitable for residential development).

82. BABCOCK, *supra* note 80, at 158.

B. Zoning Reform

In 1975, the Supreme Court of Oregon decided *Baker v. City of Milwaukie*⁸³ and set in motion a "movement" that, at least while it had breath, invited substantial and meaningful zoning reform. In *Baker*, the court accepted the Haar/Babcock planning-regulation construct,⁸⁴ which accords legal significance to the comprehensive plan as an instrument of public policy.⁸⁵ Zoning without the predicate of a plan lacked coherence.⁸⁶ In this regard, *Baker* was no more significant than *Udell v. Haas*⁸⁷ and other "comprehensive plan" cases of the times. However, *Baker* turned out to be notable because the logical extension of the comprehensive plan theorem was that if planning is a legal prerequisite to zoning—the establishment of official policy—then zoning in accordance with the plan was nothing more than an implementation tool and not an exercise of policy-making power.

C. Zoning as a Quasi-Judicial Act

The 1973 decision of the Supreme Court of Oregon in *Fasano v. Board of County Commissioners*⁸⁸ was a true landmark decision which pierced through the fiction that rezonings were legislative acts.⁸⁹ Eventually,

83. 533 P.2d 772 (Or. 1975).

84. See Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1175 (1955).

85. *Baker*, 533 P.2d at 778.

86. Haar, *supra* note 84, at 1175.

87. 235 N.E.2d 897 (N.Y. 1968). "Rather, the comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll." *Id.* at 900-01.

88. 507 P.2d 23 (Or. 1973), *disapproved by* *Neuberger v. City of Portland*, 607 P.2d 722 (Or. 1980). See discussion *infra* note 98.

89. The quasi-judicial approach to rezonings was actually embraced earlier, in the 1972 Supreme Court of Washington decision in *Fleming v. City of Tacoma*, 502 P.2d 327 (Wash. 1972). In *Fleming*, the court stated:

Generally, when a municipal legislative body enacts a comprehensive plan and zoning code it acts in a policy making capacity. But in amending a zoning code, or reclassifying land thereunder, the same body, in effect, makes an adjudication between the rights sought by the proponents and those claimed by the opponents of the zoning change. The parties whose interests are affected are readily identifiable. Although important questions of public policy may permeate a zoning amendment, the decision has a far greater impact on one group of citizens than on the public generally.

between ten and fifteen states embraced the *Fasano* rule⁹⁰ before events and time overtook the idea and reversed the tide of reform. The issue in *Fasano* was the role of the courts in zoning cases. Building on the planning construct of *Baker*, the *Fasano* court dismissed the fiction of zoning as an exercise of legislative power. The court stated:

At this juncture we feel we would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers. Local and small decision groups are simply not the equivalent in all respects of state and national legislatures. There is growing judicial recognition of this fact of life:

It is not a part of the legislative function to grant permits, make special exceptions, or decide particular cases. Such activities are not legislative but administrative, quasi-judicial, or judicial in character. To place them in the hands of

Id. at 331; see *Snyder v. City of Lakewood*, 542 P.2d 371, 373-74 (Colo. 1975) (following *Fleming*). Other courts have also classified rezoning as quasi-judicial, but have not directly addressed the issue. See, e.g., *Kelley v. John*, 75 N.W.2d 713 (Neb. 1956) (making zoning from changes from residential to business use an administrative act not subject to referendum); *City of Sand Springs v. Colliver*, 434 P.2d 186 (Okla. 1967) (affirming mandatory injunction requiring approval of application to change zoning); *Bird v. Sorenson*, 394 P.2d 808 (Utah 1964) (upholding change in zoning from residential to commercial as administrative act not subject to referendum).

The *Fasano* decision was also influenced by a student comment which had appeared in the *Ohio State Law Journal*. See Michael S. Holman, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130 (1972).

90. *Margolis v. District Court*, 638 P.2d 297 (Colo. 1981); *Cooper v. Board of County Comm'rs*, 614 P.2d 947 (Idaho 1980); *Golden v. City of Overland Park*, 584 P.2d 130 (Kan. 1978); *Dufau v. Parish of Jefferson*, 200 So. 2d 335 (La. App. 4th Cir. 1967) (establishing a "change of mistake" rule for evaluating zoning decisions, but was not uniformly followed); *Northwest Merchants Terminal v. O'Rourke*, 60 A.2d 743 (Md. 1948) (following change-mistake rule for rezoning which suggests stricter standard than traditional "fairly debatable" rule); *State ex rel. McNary v. Hais*, 670 S.W.2d 494 (Mo. 1984) (en banc); *Lowe v. City of Missoula*, 525 P.2d 551 (Mont. 1974), *overruled sub nom.* *Greens at Fort Missoula v. City of Missoula*, 897 P.2d 1078 (Mont. 1995); *Winslow v. Town of Holderness Planning Bd.*, 480 A.2d 114 (N.H. 1984); *Cherney v. Matawan Borough Zoning Bd.*, 534 A.2d 41 (N.J. Super. Ct. App. Div. 1987); *Young Men & Women's Hebrew Ass'n v. Borough Council*, 240 A.2d 469, 429 (Pa. 1968); *Chioffi v. Winooski Zoning Bd.*, 556 A.2d 103 (Vt. 1989); *Kentview Properties, Inc. v. City of Kent*, 795 P.2d 732 (Wash. App. 1990); *Kaufman v. Planning & Zoning Comm'n*, 298 S.E.2d 148 (W. Va. 1982); *Holding's Little Am. v. Board of County Comm'rs*, 670 P.2d 699 (Wyo. 1983) (following *Fasano* in spirit if not explicitly).

legislative bodies, whose acts as such are not judicially reviewable, is to open the door completely to arbitrary government.⁹¹

Importantly, the *Fasano* court explicitly recognized the distinction between legislative acts to establish policy and the application of established policy to specific circumstances. The court noted:

Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of *legislative authority*, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of *judicial authority* and its propriety is subject to an altogether different test

"Basically, this test involves the determination of whether action produces a general rule or policy which is applicable to an open class of individuals, interest, or situations, or whether it entails the application of a general rule or policy to specific individuals, interests, or situations. If the former determination is satisfied, there is legislative action; if the latter determination is satisfied, the action is judicial."⁹²

According to the *Fasano* court, only the former act should be accorded a presumption of validity where the burden is on the party challenging the action of the legislative body to establish the invalidity of the action.⁹³ On the other hand, if the zoning was not legislative, then the proceedings should be attended by the rudiments of procedure and be subject to a more searching review by the courts. The court stated:

Because the action of the commission in this instance is an exercise of judicial authority, the burden of proof should be placed, as is usual in judicial proceedings, upon the one seeking change. The more drastic the change, the greater will be the burden of showing that it is in conformance with the comprehensive plan as implemented by the ordinance, that there is a public need for the kind of change in question,

91. *Fasano*, 507 P.2d at 26 (quoting *Ward v. Village of Skokie*, 186 N.E.2d 529, 533 (Ill. 1962) (Klingbiel, J., specially concurring)). Richard Babcock, of course, takes full credit for having spread the gospel; credit that is, in fact, due.

92. *Id.* at 26-27 (quoting *Holman*, *supra* note 89, at 137) (emphasis added).

93. *Id.* at 29.

and that the need is best met by the proposal under consideration. As the degree of change increases, the burden of showing that the potential impact upon the area in question was carefully considered and weighed will also increase.⁹⁴

The principal thrust of the *Fasano* opinion was to recharacterize the nature of a rezoning decision and to redefine the scope and character of judicial review of such decisions. However, implicit in the court's decision that land use decisions involving individual parcels of land were "judicial" in character was a requirement for due process. This can be gleaned from the court's statement that:

With future cases in mind, it is appropriate to add some brief remarks on questions of procedure. Parties at the hearing before the county governing body are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter—i.e., having had no pre-hearing or ex parte contacts concerning the question at issue—and to a record made and adequate findings executed.⁹⁵

D. *The Turn of the Judicial Tide*

For Babcock and other reformers, the promised land was at hand as *Fasano* swept across the land and more than a dozen states embraced its apparent logic. Florida was not among the *Fasano* adherents, and in *Florida Land Co. v. City of Winter Springs*,⁹⁶ the Supreme Court of Florida rejected the argument that an exercise of the police power focused on an individual parcel of land was not a legislative act.⁹⁷ Unfortunately, events conspired against the movement and ultimately, the "revolution," engendered by *Baker* and its most famous progeny, *Fasano*,⁹⁸ lost its momentum. With that loss came the demise of the promise of immediate and meaningful zoning reform.

94. *Id.*

95. *Id.* at 30.

96. 427 So. 2d 170 (Fla. 1983).

97. *Id.* at 174.

98. *Fasano* was disapproved by *Neuberger v. City of Portland*, 607 P.2d 722 (Or. 1980), in which the Oregon Supreme Court held that the substantive criteria for zone changes set forth in the *Fasano* opinion "could only apply in addition to, not instead of, other standards imposed by law." *Id.* at 727.

There are almost as many explanations for why the *Fasano* doctrine lost its momentum as there are explanations for why the sky is blue. Some argue that the concept was too threatening to political prerogatives and was forcibly destroyed by the forces of "evil." Others conclude that the distinct character of state enabling acts posed an insurmountable obstacle to the reform movement in many states. Still others believe that the Supreme Court of the United States' opinion in *City of Eastlake v. Forest City Enterprises, Inc.*,⁹⁹ was misunderstood and misapplied as a rejection of the *Fasano* doctrine.

In *Eastlake*, a developer challenged a referendum provision which allowed the zoning of a particular parcel of land to be changed by popular vote, without regard to procedural niceties or consideration of the merits.¹⁰⁰ The developer argued that the lack of procedural safeguards and substantive standards to guide the application of the zoning power to a particular parcel of land violated the property owner's due process rights under the *Constitution of the United States*.¹⁰¹ The Supreme Court rejected the developer's claim, holding that the State of Ohio considered zoning to be a legislative act¹⁰² and that due process does not attach to legislative acts.¹⁰³ According to the Court, no federally protected rights were trammied by the referendum process.¹⁰⁴

Another popular explanation is that the transformation of local zoning hearings into formal adjudications was problematic. Local government officials were not comfortable serving as "trial judges" and wished to avoid the obvious adversarial nature of formal adjudicatory proceedings. Local officials were also hesitant to subjugate their political prerogative to respond to constituent demands by confining their decisions to admissible evidence.

Still others have concluded that the doctrine simply had a bad sense of timing and was interdicted by another "reform" movement—*Monell v. Department of Social Services*.¹⁰⁵ What happened, or at least what makes sense, is that the liability for "improvident land use decisions" movement¹⁰⁶ represented by *Monell*, and the repeated attempts in the 1980s by the real estate and development industries (the presumed beneficiaries of

99. 426 U.S. 668 (1976).

100. *Id.* at 671.

101. *Id.* at 676.

102. *Id.* at 673-74.

103. *Id.* at 679.

104. *Eastlake*, 426 U.S. at 678-79.

105. 436 U.S. 658 (1978).

106. The "taking mavers" and their ilk.

zoning reform) to induce the Supreme Court of the United States to reach the so-called "taking issue" had the perverse effect of thrashing zoning reform. City attorney after city attorney argued that it does not make sense to accede to the notion that zoning is not a legislative act when the consequence of that cognition is to expose decision-makers to potential liability.

Whatever the cause, *Fasano* lost its momentum and property rights mavens turned their attention to the so-called taking issue in search of a balance between public and private interests in the use of private property. Pointing to Justice Oliver Wendell Holmes' ode to property rights in *Pennsylvania Coal Co. v. Mahon*,¹⁰⁷ property rights advocates argued that when a government goes too far in the exercise of its regulatory power, the government must pay compensation. The advocates' theory was that a compensation remedy for regulatory excesses would deter governments from treading on private property rights and realign the balance between public and private interests in the use of private property. The "police power hawks" argued, on the other hand, that Justice Holmes' oft-quoted statement¹⁰⁸ was mere metaphorical dictum and that governmental action which went too far was invalid and did not constitute a taking for public use. The results of the debate, played out in a series of cases considered by the Court,¹⁰⁹ ultimately favored the compensation advocates. History, however, does not confirm that the threat of compensation constitutes an effective governor for regulatory zeal. Indeed, in retrospect, it is possible to argue that by and large the entire taking issue debate was much ado about nothing because, as discussed previously, the deferential standard of judicial review applied to local government zoning decisions renders the question of available remedies all but a matter of academic curiosity.

107. 260 U.S. 393 (1922).

108. "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

109. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Gorieb v. Fox*, 274 U.S. 603 (1927); *Village of Euclid v. Ambler Realty Corp.*, 272 U.S. 365 (1926).

E. *Florida Joins the Movement*

More than a decade after *Fasano* lost its momentum, and almost twenty years after Richard F. Babcock's *The Zoning Game* challenged the legal fiction of zoning as a legislative act, the Supreme Court of Florida joined the movement in *Board of County Commissioners v. Snyder*.¹¹⁰ In *Snyder*, the court noted: "It is the character of the hearing that determines whether or not board action is legislative or quasi-judicial. Generally speaking, legislative action results in the *formulation* of a general rule of policy, whereas judicial action results in the *application* of a general rule of policy."¹¹¹ In addition, the supreme court agreed with the court below, which it quoted as stating:

[R]ezoning actions which have an impact on a limited number of persons or property owners, on identifiable parties and interests, where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, and where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of . . . quasi-judicial action¹¹²

The Snyders owned a one-half acre parcel of property in unincorporated Brevard County.¹¹³ The parcel was designated for residential use under the 1988 Brevard County Comprehensive Plan Future Land Use Map. The property was zoned for general use, allowing the construction of a single family home. The Snyders filed an application to rezone the property to a zoning classification which allowed a maximum of fifteen units per acre. At the time, both the current and the requested zoning classifications were consistent with the residential comprehensive plan designation. The County staff initially suggested that the application be denied because the property was located in the one-hundred-year flood plain. The comprehensive plan allowed only two units per acre to be built in areas within the flood plain, and thus, the Snyders' requested zoning was inconsistent with the plan. However, the county director of planning and zoning pointed out that the property, when developed, would no longer be within the flood plain. The

110. 627 So. 2d 469 (Fla. 1993).

111. *Id.* at 474 (emphasis added) (citations omitted).

112. *Id.* (quoting *Snyder v. Board of County Comm'rs*, 595 So. 2d 65, 78 (Fla. 5th Dist. Ct. App. 1991)).

113. *Id.* at 471.

staff then recommended approval of the rezoning and the Snyders' request was approved by the planning and zoning board.¹¹⁴

The Snyders' request then went before the Board of County Commissioners for approval. Many citizens opposed the project at the commission meeting, for the most part, due to the increase in traffic which would be caused by the development. The county commissioners voted to deny the requested rezoning, stating no reasons for their denial.¹¹⁵

The Snyders filed a petition for writ of certiorari in the circuit court, which was denied.¹¹⁶ They then filed a petition for writ of certiorari in the district court of appeal to review the circuit court's denial of relief, claiming that the circuit court departed from the essential requirements of law in failing to require the county commission to make findings of fact.¹¹⁷ The Fifth District Court of Appeal granted the petition for certiorari, quashed the denial of the petition in the circuit court, and remanded the case for proceedings consistent with its opinion.¹¹⁸

The County appealed the Fifth District's decision to the Supreme Court of Florida.¹¹⁹ The first issue addressed by the court was whether the nature of the County's action was legislative or quasi-judicial. The nature of the action determines the level of scrutiny by the court. The court described the levels of scrutiny as follows:

A board's legislative action is subject to attack in circuit court. However, in deference to the policy-making function of a board when acting in a legislative capacity, its actions will be sustained as long as they are fairly debatable. On the other hand, the rulings of a board acting in its quasi-judicial capacity are subject to review by certiorari

114. *Id.*

115. *Snyder*, 627 So. 2d at 471.

116. *Id.*

117. *Id.*

118. *Id.* at 472.

119. The Supreme Court of Florida accepted review of *Snyder* based on conflict with *Schauer v. City of Miami Beach*, 112 So. 2d 838 (Fla. 1959); *Palm Beach County v. Tinnerman*, 517 So. 2d 699 (Fla. 4th Dist. Ct. App. 1987), *review denied*, 528 So. 2d 1183 (Fla. 1988); and *City of Jacksonville Beach v. Grubbs*, 461 So. 2d 160 (Fla. 1st Dist. Ct. App. 1984), *review denied*, 469 So. 2d 749 (Fla. 1985). See *Snyder*, 627 So. 2d at 470. The court stated that *Schauer* found that the amendment of a zoning ordinance which affected a large number of persons was an act legislative in nature and that the district courts of appeal had gone further in *Tinnerman* and *Grubbs*, holding that board action on specific rezoning applications of individual property owners was also legislative. *Id.* at 474.

and will be upheld only if they are supported by substantial competent evidence.¹²⁰

It appears that the court recognized a problem with the current standard of review for zoning amendments but, rather than modify the existing "fairly debatable" standard of review, the court chose to reach a standard of review for individual zoning decisions by analyzing the nature of those decisions. Citing to *West Flagler Amusement Co. v. State Racing Commission*,¹²¹ the court explained:

A judicial or quasi-judicial act determines the rules of law applicable, and the rights affected by them, in relation to past transactions. On the other hand, a quasi-legislative or administrative order prescribes what the rule or requirement of administratively determined duty shall be with respect to transactions to be executed in the future, in order that same shall be considered lawful. But even so, quasi-legislative and quasi-executive orders, after they have already been entered, may have a quasi-judicial attribute if capable of being arrived at and provided by law to be declared by the administrative agency only after express statutory notice, hearing and consideration of evidence to be adduced as a basis for the making thereof.¹²²

In describing the difference between a quasi-judicial and legislative act, the court focused on the relation of the governmental decision in time to the property owners activity and the procedural due process requirements necessary for the governmental decision.¹²³ Applying this criterion, the court determined that comprehensive rezonings affecting a large portion of the public are legislative in nature and held that the Board of County Commissioners' action on the Snyders' petition was a quasi-judicial action properly reviewable by certiorari.¹²⁴

F. *The Problem with Snyder*

The difficulty with the Supreme Court of Florida's decision in *Snyder* is that the court, after arriving at the important way station of recognizing that individual rezonings are functionally not legislative acts, apparently lost

120. *Snyder*, 627 So. 2d at 474 (citations omitted).

121. 165 So. 64 (Fla. 1935).

122. *Snyder*, 627 So. 2d at 474 (quoting *West Flagler*, 165 So. at 65).

123. *Id.* at 474.

124. *Id.* at 474-75.

its way in concluding that such actions are in the “nature of a quasi-judicial [action].”¹²⁵ The court’s language, “in the nature of,” does not actually hold that individual rezonings are quasi-judicial. However, if a distinction was intended, it has been lost in the maelstrom which has followed *Snyder*.

In truth, individual rezonings have never been “quasi-judicial” actions. A quasi-judicial proceeding is one in which a decision is based on discrete standards. In the zoning universe, the variance is a classic example of a quasi-judicial proceeding where a property owner seeks relief from zoning requirements on the basis of specific standards such as “undue hardship.” In contrast, rezonings, even individual rezonings, are based on general standards, such as the goals, policies, and objectives of a comprehensive plan.

Nor should individual rezonings be quasi-judicial. The reality, however, is that land use planning is not a precise science which can be reduced to specific standards because the key factor in land use—compatibility—is governed by the eye of the beholder, the collective judgment of a democratically elected governing body.¹²⁶ Zoning decisions, even individual zoning decisions are by their nature inherently “political,” that is, infused with collective values and directions which are politically derived. Nonetheless, that is the way it should be, because planning and zoning are essential political issues at the local government level and go to the very essence of community.

A fundamental flaw in the leap of faith to “quasi-judicial” is that the very object of the zoning reformers and the principal value of discarding the legal fiction that zoning is a legislative act is destroyed. This is so because quasi-judicial proceedings are apparently deemed reviewable only by certiorari, a judicial review which is every bit as deferential to local

125. *Id.* at 474.

126. That “compatibility” is often mere perception is easily illustrated. Consider a 500-acre parcel of land slated for development. The developer lays out a network of local streets and residential lots with a traditional neighborhood shopping area in the center of the project. The neighborhood shopping center is opened at the same time that the first phase of residential lots are available for sale and the project builds out quickly. The residents extol the virtues of their “neighborhood” telling anyone who will listen that the convenience and safety of “their” neighborhood shopping center is the element which makes their neighborhood a “community of place.” Then take the same parcel of land, the same development plan and make one small change, build the neighborhood shopping center after all of the homes have been built and sold. Same shopping center, same homes, same neighbors, and same compatibility, but with a very different result. In this later scenario, the shopping center is viewed as an alien which will destroy the fabric of their neighborhood and the residents will fight the development of the center to the finish.

decision-makers' prerogatives as is the fairly debatable review.¹²⁷ After all, the standard for certiorari review substitutes a search for any justification (denominated competent substantial evidence)¹²⁸ for a search for the truth.¹²⁹ Under the certiorari standard, all a local government need do is pack the record with unauthenticated documents and "words of rationality" to survive the limited amount of scrutiny afforded by the competent substantial evidence standard. The fact is that under the certiorari standard, the weight of the evidence is irrelevant, leaving local governments just as free to be arbitrary and capricious as under the fairly debatable rule.

Worse still, certiorari review forces local government officials into a bizarre netherworld where they serve, at the same time in the same proceedings, as judges (ruling on questions of evidence and objections), parties (elected representatives of the people), and jury (impartial decision-makers), all under the watchful eye of their political constituencies.¹³⁰ Under the quasi-judicial paradigm, the city faces a difficult "Catch twenty-two." When an application for a rezoning is submitted, city staff is faced with the Hobson's choice of taking a position in regard to the zoning—for or against one of the parties in the adjudication—or running the risk that the ultimate decision will not be supported by competent substantial evidence. The only way to resolve the choice without taking sides is for the staff to remain neutral and ensure that there is sufficient evidence for and against the proposition to support whatever decision is made.

127. See *City of Deerfield Beach v. Vaillant*, 399 So. 2d 1045, 1046-47 (Fla. 4th Dist. Ct. App. 1981).

128. The Supreme Court of Florida has commented on the scope of certiorari review, saying:

The circuit court, therefore, transcended the scope of its certiorari review by substituting its judgment for that of the local zoning authority. Because zoning or rezoning is the function of the appropriate zoning authority and not the courts, the circuit court was not empowered to disapprove the finding of the Board unless the record was *devoid* of substantial competent evidence to support the Board's decision.

Skaggs-Albertson's v. ABC Liquors, Inc., 363 So. 2d 1082, 1091 (Fla. 1978) (footnote omitted) (emphasis added).

129. The very idea that judicial review should be based on a record composed mostly of unsubstantiated, lay opinion and large doses of political science which was compiled in front of elected officials with only the faintest attention to the rules of evidence, is remarkable on its face and ludicrous in practice.

130. The political implications and influences of zoning decisions cannot be overstated, particularly in communities where local elections are held every two years and public hearings are available on local access television.

The simple fact is that the zoning reformers, while advocating more regular proceedings at the local level, were not seeking to transform the zoning process into formal adjudicatory proceedings. Rather, they were advocating that the courts, when reviewing the actions of local government, should discard the legal fiction that rezonings were "legislative acts" and afford a more exacting judicial review than the "anything goes" presumption of legislative validity. In other words, individual rezonings should be reviewed in the courts, *de novo*. They should not be reviewed under the "anything goes," fairly debatable standard, but rather, under a more exacting standard which could be called something like the "rational justification rule."

Under the "rational justification rule," a court would hold a *de novo* proceeding, attended by the rules of evidence, to determine whether a particular rezoning action "bears a substantial relationship to the public health, safety, and welfare." In the absence of any evidence that the action is not sufficiently related to the public welfare, the court would defer to the local government. In other words, a plaintiff would have the burden of proof to demonstrate that the challenged action did not bear the requisite relationship to the public health, safety, and welfare; or to put it another way, that the regulation exceeds the bounds of necessity.¹³¹ If the plaintiff makes this initial showing, the burden of proof would shift to the local government to demonstrate that the action at issue does in fact bear some substantial relationship to the public health, safety, and welfare. After hearing all of the evidence, the court would then rule based on the manifest weight of the evidence. If the local government succeeds in demonstrating by the manifest weight of the evidence that the action in fact bears "some substantial relationship to the public health, safety, and welfare," then the local government's action would be sustained.

V. CONCLUSION

Effective judicial review is the foundation of any civilized system of rights. For too many years, planning and zoning regulations have been immunized from judicial scrutiny. As a result, local government planning and zoning has become adversarial and divisive. Worse still, property owners and developers have turned to the legislature to limit the planning and zoning powers of the government. In Florida, the legislature has acted by creating a law which is very likely to further muddy the already dark

131. See *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Burritt v. Harris*, 172 So. 2d 820 (Fla. 1965).

waters of planning jurisprudence. More laws and more standards are not needed. What is needed is an effective means of enforcing those laws that already exist. When, and if, the traditional substantive due process standard in Florida—the “bounds of necessity” standard, as articulated in *Burritt v. Harris*—is freed from the “anything goes” application of the fairly debatable rule, the “rational justification” standard or the “substantially advances taking” standard can become the norm of judicial review in Florida. Then the power and resources needed for effective planning and zoning will be secure and available. In contrast, if effective and meaningful judicial relief continues to be illusory in Florida, the march of property rights legislation will continue, and ultimately, the system will fail. Two decades of planning preoccupation with “legal defensibility” has set the “default switch” against enlightened resource planning and management. Something has to give or there will be more Bert K. Harris¹³² acts and more decisions in the vein of *First English*, *Nollan*, *Lucas*, and *Dolan*.

132. See FLA. STAT. § 70.001 (1995).